IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 402 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GANESH RAMASWAMI MADRASI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 402 of 2001

MS SADHANA SAGAR for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR PR ABICHANDANI, APP, for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 09/10/2002

ORAL JUDGEMENT

1. The appellant is convicted for an offence punishable under Section 20(B)(1) of the Narcotic Drugs and Psychotropic Subtances Act, 1985 ("NDPS Act" for

short) and sentenced to undergo rigorous imprisionment for a period of five years and to pay a fine of Rs.25,000/-, in default, to undergo rigorous imprisonment for one year, by virtue of a judgment and order rendered by the learned Additional Sessions Judge, Rajkot, in Sessions Case No.94 of 1999.

2. The appellant was accused No.1 before the Trial Court, who was charged to have committed the said offence by keeping in his possession Ganja weighing 17.500 kgs. As per the prosecution case, police got an information that the appellant staying at the house of Rajput Ladhabhai Devdasbhai, on Kuvadava Road, in Vallabhnagar Sheri No.2 and his son-in-law, Fakir Dilipsha, are selling Ganga. The Police Inspector, who got the information, reduced it into writing by making entry No.10/99 in the Station Diary, sent a report to his immediate superior, Assistant Commissioner of Police and arranged for a raid. Panch witnesses were summoned, a preliminary Panchnama was drawn and they went to the place. They stopped the vehicle near the house occupied by Ganesh Madrasi, i.e. the appellant. The door was closed. Therefore, they shouted for Ganeshbhai. A person opened the door. There was one more person sitting in the room. On being asked, the person who opened the door identified himself as Ganesh Rameshwar alias Ramaswamy Madrasi and the person inside the room identified himself as Fakir Dilipsha Hasamsha. The police informed the said two persons that they have information about them trading in Ganja and, therefore, the police is required to search their person and the room and, therefore, if they so desire, another Gazetted Officer or Magistrate may be arranged for. The two persons did not ask for search being conducted in presence of a Magistrate or a Gazetted Officer. The room, therefore, was searched and the Ganja was found in a tin box. It was found to weigh 17.500 kgs. A slip containing signatures of the Panch witnesses was placed inside the packet wherein a sample of 500 grams Ganja was segregated and, thereafter, seal of the police was applied. For the remaining 17 kgs. of the contraband, which was lying in the tin box, again a slip was put inside the box and, thereafter, the seal was applied. The two persons were searched and nothing was found except money. Ultimately, they were arrested. A complaint was lodged by Police Inspector, Kalekhan Alamkhan Kureshi, offence was registered and investigation was made. The contraband was deposited with the Writer Head, who, in turn, sent the sample to the Forensic Science Laboratory, Junagadh, and, on receiving a report from the F.S.L. that the muddamal was

Ganja, charge sheet was filed. The matter was committed to the Court of Sessions where it came to be registered as Sessions Case No.94 of 1999.

2.1 The charge against the accused persons was framed at Ex.1 for offences punishable under Section 20 read with Section 29 of the NDPS Act. Both the accused persons pleaded not guilty to the charge and claimed to be tried.

3. The prosecution led the evidence and, after considering the evidence on record, the learned Additional Sessions Judge came to a conclusion that the prosecution was successful in establishing charges against accused No.1, the appellant herein and, therefore, recorded conviction and sentenced him, as above. The learned Additional Sessions Judge, however, found that the charges levelled against accused No.2 were not established and, therefore, he recorded an acquittal qua accused No.2. Original accused No.1 has, therefore, preferred this appeal.

4. Learned Advocate, Ms. Sadhana Sagar, contended that the appellant is, admittedly, a non-Gujarati person. There is no material to indicate that he was conversant with Gujarati language. However, the entire investigation proceedings as well as the trial have proceeded in Gujarati and, therefore, the investigation as well as the trial would be vitiated. The accused would be deprived of his right of a fair trial. The second fold of contention is that the Panch witnesses have not supported the prosecution case. Both of them have turned hostile. It is also submitted that the mandatory requirement of sub-section (2) of Section 42 has not been complied with. A contention regarding the sealing procedure has also been raised. According to her, the sealing procedure is not proper and exposes the prosecution to the possibility of the muddamal being tampered with. She submitted, lastly, that the Investigating Officer, Police Inspector-Kureshi, has admitted in his cross-examination that, at certain places, he signed as P.S.O. and at certain places, he signed as P.I., the signatures differ and the designations differ and, therefore, it is a matter of doubt whether the investigation was efficiently and impartially carried out or not. Ms. Sagar, therefore, submitted that the collective effect would be that the prosecution case would reel under a shadow of doubt and the benefit may be given to the accused person.

5. Learned Additional Public Prosecutor, Mr.

Abichandani, has opposed this appeal. According to him, the contention regarding the appellant not knowing Gujarati language is raised at a very belated stage, as an afterthought, only when the further statement under Section 313 is recorded. The accused-appellant could very well have raised this contention before the Investigating Officer when his signature was obtained. He could have very well raised the contention when charge was framed by the Trial Court or even when the evidence was recorded. But, at none of these stages, the accused raised a dispute about the his not knowing Gujarati language. On the contrary, the witnesses are thoroughly cross-examined and, therefore, even if the appellant is taken to be not knowing Gujarati language, he can be said to have waived his right of insisting for proceeding in a language known or understood by him. Mr. Abichandani submitted that, so far as compliance of Section 50 is concerned, no contraband is found during the search of the appellant and, therefore, non-compliance of Section 50 in form of not informing the appellant of his right of being searched in presence of a Gazetted Officer or a Magistrate in a language understood by him will be of no effect. Mr. Abichandani submitted that, if deposition of Constable-Rameshbhai Damjibhai is seen, he has described the procedure followed for sealing the muddamal and that procedure is foolproof and leaves no room for any doubt or possibility of tampering with the muddamal. Mr. Abichandani, therefore, submitted that the contentions raised in the appeal may not be accepted, the Trial Court has rendered a well-reasoned and well-balanced judgment and order, and the appeal may, therefore, be dismissed.

6. Having regard to the contentions raised before this Court, if the evidence is considered in that light, it has to be noted that the appellant has raised the dispute of him not knowing Gujarati language, for the first time, when his statement under Section 313 was recorded. Prior thereto, at no point of time, he has raised this dispute. It, therefore, appears to be an afterthought, more so, when as per the prosecution evidence, the appellant has been staying in Gujarat for a long time and was a tenant of witness-Ladhabhai Devdasbhai (Ex.21).

7. The evidence of the material witnesses, namely, Police Inspector-Kureshi and Rameshbhai Damjibhai, becomes important to ascertain as to how the raid was conducted, whether mandatory requirements were complied with or not and whether the contraband seized was properly seized after adopting proper sealing procedure.

8. In this regard, Rameshbhai Damjibhai is examined at Ex.10. He says that he was working as a Police Constable with Rajkot City "B" Division Police Station on March 22, 1999. While he was on duty, at about 10.30 A.M., he was summoned by P.I.-Kureshi and was asked to call F.S.L. Officer as well to submit a report to the Assistant Commissioner of Police. The report contained details about the information received by the P.I. to the effect that Ganesh Madrasi and his son-in-law, Dilipsha Fakir, staying in the house of Ladhabhai Rajput, at Vallabhnagar Sheri No.2, opposite Jaihind Weighbridge, on Kuvavada Road, Rajkot, illegally sell Ganja. He says that, he went to the F.S.L. to come to know that the F.S.L. Officer was on leave and the charge was held by the Junagadh Officer, Mr. Jani. He, then, went to the office of the Assistant Police Commissioner and submitted the report. Then, he went back to the chamber of P.I.-Kureshi and, immediately, after drawing primary Panchnama, they went to the place in question. On reaching the place, they found that the room was closed. Therefore, they loudly called out the name of Ganeshbhai. A person opened the door, who, ultimately, turned out to be the appellant. One more person was sitting in the room, who turned out to be Dilipsha Hasamsha Fakir. The witness says that, after informing them of the purpose, the persons were told that they are required to be searched and, therefore, if they desire to be searched in presence of a Gazetted Officer or a Magistrate, the same can be arranged for. Both of them said that they have no objection, if the police conducts search. The raiding party went into the room after a mutual search and found Ganja in an aluminium box. They also found a rexine bag and weighing scales and on weighment, Ganja was found to weigh 17.500 kgs.

8.1 The witness says that 500 grams of Ganja is segregated, put into a plastic bag and a slip containing signatures of the Panch witnesses was put therein and the plastic bag was tied with a thread, put into a Khakhi coloured paper envelop, a slip containing signatures of Panch witnesses was placed therein and, thereafter, seal was applied. The remaining contraband was again placed into the aluminium box and the lid was closed and, after putting a slip containing signatures of the Panch witnesses, it was sealed with wax under the seal of P.I. Both the persons were apprehended. A suggestion is put to him in cross-examination that the sealing procedure was not followed as stated by him in examination-in-chief.

9. Against this deposition, there is deposition of P.I.-Kureshi (Ex.23). The deposition is similar to the earlier witness except for the sealing procedure. The witness speaks of Ganja having been found from a tin box and not an aluminium box. He says, after the weighment, 500 grams of Ganja was segregated and put into a plastic bag and was sealed, as per the procedure indicated in the Panchnama. He also says that the remaining 17 kgs. of Ganja was retained in the tin box and the tin box was seized after sealing, as per the details stated in the Panchnama.

9.1 The Panchnama is produced at Ex.8. In the Panchnama, the sealing procedure that was followed is described thus:

> "500 rams of Ganja was segegated. Put into a blue coloured bag. A slip containing signatures of the Panch witnesses was put inside the bag. Thereafter, the plastic bag was put into a Khakhi envelop, which was again sealed with gum, bound by a thread and, thereafter, seal of Police Inspector, Rajkot, was applied thereon. Remaining contraband was kept in the tin box, slip containing signatures of the Panch and Police was put inside the box, the lid was closed and, thereafter, it was tied with a thread and seal of Police Inspector, Rajkot, was placed thereon."

9.2 The complaint of P.I.-Kureshi (Ex.24), if seen, indicates the same pocedure, as stated in the Panchnama, i.e. segregation of 500 grams of Ganja; putting that quantity into a blue coloured bag; putting a slip containing signaures of Panchas and Police into the bag, thereafter, putting that bag into a Khakhi envelop; and, then, after sealing the said envelop with gum, tying it with a thread and applying seal of Police Inspector, Rajkot. The same procedure was followed for remaining 17 kgs. of Ganja.

10. What now, therefore, emerges from the depositions of Police Inspector-Kureshi as well as Rameshbhai Damjibhai is that there is variance in the procedure indicated to have been followed by the Police while sealing the contraband and seizing it. In this regard a judgment of a Division of this Court (wherein I was a party) rendered in Criminal Appeal No.323 of 1996 can squarely be made applicable to the facts of the present case. In the said judgment, it was observed thus :-

"5.....The very purpose behind carring out the search, taking of sample and sealing in presence of Panch witnesses is to ensure that there is no scope for any mischief in procedure required to be followed. At the time of sealing, slips containing signatures of Panch witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done here, as discussed earlier, the possibility of tampering cannot be ruled out. Under the circumstances, the procedure followed for sealing in the instant case cannot be said to be proper and free from any possibility of tampering. The procedure, therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused."

The sealing procedure, therefore, cannot be said to have been properly followed. The benefit, therefore, has to go to the accused.

11. Apart from this, it has to be noted that the Panch witnesses have not supported the prosecution case. The prosecution case, therefore, depends on police witnesses. Two police witnesses, who are examined, give divergent depositions, particularly, in respect of the sealing procedure. It is true that the sealing procedure described by Rameshbhai Damjibhai is as per the said judgment, but his version becomes doubtful for the reason that the Police Inspector, in his deposition, asserts that the procedure as stated in the Panchnama was followed for sealing and seizure. The Panchnama and the complaint indicate a different procedure to have been followed while sealing and seizing the contraband, which was not approved by the Division Bench of this Court. Apart from this, presence of Rameshbhai Damjibhai at the time of sealing is also tried to be indicated to be doubtful, as per corss-examination. In any event, it is a matter of doubt as to which procedure was followed and there is total lack of independent evidence. The evidence of Police Officer is contradictory and, therefore, benefit should got to the accused.

12. At this stage, in light of the above observations, Ms. Sagar does not press for a verdict on other contentions raised by her in the course of

arguments.

13. The appeal, therefore, deserves to be allowed. The same is allowed. The judgment and order of the learned Additional Sessions judge, Rajkot, rendered in Sessions Case No.94 of 1999 on the 30th April, 2001, qua the appellant, is set aside. The appellant be set at liberty forthwith, if not required in any other case. Fine, if paid, to be refunded.

[A.L. DAVE, J.]

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